Supreme Court, U.S.
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No. 98-888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD JOHNSON,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

-and-

CAROL NICHOLSON, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CAROL NICHOLSON, *et al.*

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QUESTION PRESENTED

The class notice was approved by the District Court (Wolin, J.), which characterized the notice as having been written in "plain English" and as having "struck an appropriate balance between brevity and descriptiveness." The class notice also was unanimously affirmed by the United States Court of Appeals for the Third Circuit (Scirica, J.), which agreed with the District Court that the notice was not too confusing but rather was "unparalleled," "comprehensive," and "effective." Moreover, (i) the class notice was mailed to all Class Members by first class mail, (ii) the class notice included a six-day-a-week toll free "800" telephone number that Class Members could call for personal answers to their questions, (iii) the class notice was accompanied by a cover letter and "Q&A Booklet," which sought to answer potential questions in the most user-friendly format possible, and (iv) in addition to the mailed notices, the notice program also included published notices in newspapers in all 50 states, and multiple radio and television advertisements, all of which repeated both the "800" number and instructions for obtaining the official class notice. Accordingly, should this Court deny certiorari when the Petition asks this Court to review, under an abuse of discretion standard, whether the class notice in this action was too confusing?

PARTIES TO THE PROCEEDING

The respondent identified in the caption to the Petition is The Prudential Insurance Company of America ("Prudential"). The respondents should also include the named class representatives, Carol Nicholson, Martin Dorfner, Vincent Kuchas, Elizabeth Kuchas, and Norman Gassman. The petitioner is Richard Johnson.

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Statute:

28 U.S.C. § 1254(1) 1

Rule:

Supreme Court Rule 10 4

The opinion of the United States District Court for the District of New Jersey (Wolin, J.) is reported at 962 F. Supp. 450. The unanimous opinion of the United States Court of Appeals for the Third Circuit (Scirica, J.) is reported at 148 F.3d 283.

STATEMENT OF JURISDICTION

Jurisdiction is alleged to exist in this Court pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

During early 1995, aggrieved policyholders throughout the country brought both individual and class actions against Prudential. After two years of hotly contested litigation, the class action settled.

On October 28, 1996, the District Court (Wolin, J.), approved the form of class notice for dissemination to policyholders to advise them of the proposed settlement (and also approved the method of dissemination), and set a date for a hearing on certification of the proposed settlement class, the fairness of the proposed settlement, and plaintiffs' request for fees and reimbursement of expenses.[1] App. 231-32.[2] The District Court did so after considering an extensive record concerning the content, form, and manner in which notice would be given to the Class. *Id.*

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1. Significantly, the class notice also served as notice of a settlement with all 50 state insurance regulators. The state regulators also endorsed the content, form, and manner of the individual and publication class notices.

2. Citations to "App. __" are to the appendix to the Petition for Certiorari in *Krell v. Prudential Ins. Co. of America*, No. 98-819.

The class notice was mailed to all Class Members' current or last known address by first class mail. The class notice included a six-day-a-week toll free "800" telephone number that Class Members could call for personal answers to their questions, and was accompanied by a cover letter and "Q&A Booklet," which sought to answer a number of potential questions in the most user-friendly format possible. Moreover, in addition to the mailed notices, the notice program also included published notices in newspapers in all 50 states, and multiple radio and television advertisements, all of which repeated both the "800" number and instructions for obtaining the official class notice. *See* App. 244 (District Court discussion of "the unprecedented outreach program"); App. 335-55 (District Court discussion of the class notice and all objections to the class notice); App. 106-11 (Third Circuit discussion of same issues).

According to the Third Circuit (Scirica, J.):

> The district court described the notice and outreach program as unparalleled and found "the comprehensive notice program in this case far exceeded the requirements of Rule 23 and due process." *Id.* at 526. The district court also examined and rejected various objections to the form and content of the notice. *Id.* at 528-34.
>
> We agree with the district court's assessment of the scope of the outreach program. . . .
>
> We agree with the district court that the notice program provided all of the required information concerning the class members' rights and obligations under the settlement. It detailed the procedures for opting out, entering an appearance,

> and filing objections, and notified the policyholders that if they did not opt out of the class they would be bound by the settlement if approved. It explained the ADR process and Basic Claim Relief available to the class, provided the text of the release, and provided notification that all related documents were available for public inspection. Finally, it explained the nature of the claims covered under the settlement, and provided an 800 number through which class members could obtain information and make further inquiries. . . .

App. 109-10.

The Third Circuit also noted that:

> The individual notice provided a description of the litigation, the settlement class, and the terms of the proposed settlement, including the relief available. It set out the information regarding the fairness hearing, including the date of the hearing, the opportunity for class members to appear at the hearing, and the procedure for filing objections with the court. The notice also explained the consequences for class members who remain in the class and provided the full text of the release. Finally, the notice provided class members with the toll-free 800 number established by Prudential to address class member concerns.

App. 107 n.86. *See also* App. 335-41.

REASON FOR DENYING THE WRIT

The Petition for writ of certiorari presents no issues worthy of this Court's review. The Petition does not raise any question of statutory or Constitutional construction, or division of the federal courts. Rather, the Petition invites this Court to act as a court of error, re-visiting whether the District Court abused its discretion in approving the class notice, which it found "struck an appropriate balance between brevity and descriptiveness." App. 350. But the Third Circuit has already unanimously determined that the District Court did not abuse its discretion, and, indeed, completely agreed with the District Court that the class notice and outreach in this case were "unparalleled." All the Petitioner offers is his own personal view that there are verbal inadequacies in the notice. These personal conclusions hardly justify this Court's attention. *See* Supreme Court Rule 10 (listing considerations that favor certiorari and concluding that, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

I.

THE COURTS BELOW FOUND THAT THE CLASS NOTICE WAS WRITTEN IN "PLAIN ENGLISH," THAT THE NOTICE "STRUCK AN APPROPRIATE BALANCE BETWEEN BREVITY AND DESCRIPTIVENESS," AND THAT THE OVERALL OUTREACH WAS "UNPARALLELED."

Petitioner's highly conclusory assertions notwithstanding, the class notice and outreach in this case, reviewable under an abuse of discretion standard, were unparalleled, and the courts below so held. *See* App. 244 (District Court discussion of "the unprecedented outreach program"); App. 335-55 (District Court discussion of the class notice and all objections to the class notice); App. 106-11 (Third Circuit discussion of same issues).

Indeed, the District Court — which, contrary to the conclusory assertions in the Petition, found that the class notice was written in "plain English" (App. 254, 255) — specifically addressed and rejected Johnson's claims, *inter alia*, that the class notice failed adequately to describe the allegations of the Complaint, App. 341-42, that the class notice failed to advise class members of the consequences of remaining in the class, App. 342, and that the class notice did not fairly describe the relief and attempted to "steer" class members towards particular relief, App. 353-54. *See also* App. 254, 255 (both individual and publication notices written in "plain English").

Perhaps most importantly, the District Court specifically addressed and rejected claims by *other* objectors that the class notice was too long and too confusing[3]:

> 116. Several objectors have challenged the content of the Class Notice and the Supplemental Materials. These objections are unmeritorious. Certainly none of them indicates that this Court somehow abused its discretion in approving the form of notice. . . .
>
> 117. Though the Court will address all of the objections that can be gleaned from the often profuse ramblings of several of the objectors, the Court pauses to observe the tension involved in drafting an appropriate class action notice. On the one hand, the notice must be readable. Objectors have, for example, criticized the length of the Class Notice, arguing that policyholders cannot manage the extensive information provided. And, on the other

3. As explained *infra*, in his objections below, Johnson argued that the class notice should have contained *more*, rather than less information.

> hand, the parties must be careful to include the requisite core information. Objectors have complained also that the Class Notice fails to indicate nuances of the Proposed Settlement. The Court is mindful of the dichotomy and will assess the objectors' various grievances to ensure that neither the accuracy nor the readability of the Class Notice has been compromised. The Court has discretion to approve a wide range of possible notices, however, each of which would strike an appropriate balance between inclusiveness and brevity.

App. 340-41.

Later in its opinion, the District Court stated:

> 129. . . . *The Class Notice here, in conjunction with the Supplemental Materials, struck an appropriate balance between brevity and descriptiveness.*

App. 350 (emphasis added).

The Third Circuit agreed completely. App. 106-11 ("The district court also examined and rejected various objections to the form and content of the notice. . . . We agree with the district court that the notice program provided all of the required information concerning the class members' rights and obligations under the settlement. . . . [T]he class notice was effective.").

Finally, and paradoxically, notwithstanding his contentions in the Petition that the class notice was too confusing, in the courts below Johnson was among the objectors who complained

that the notice should have contained even *more* information. *See, e.g.*, App. 341-42 (Johnson objected that the class notice should have included more detail concerning the allegations of the Complaint, Prudential's defenses, and the strength of plaintiffs' claims); App. 342-43 (Johnson objected that the class notice should have identified each pending state class action); App. 343 (Johnson objected that the class notice should have indicated that some state class actions attempted to remove themselves from the settlement). Thus, it is disingenuous for Johnson to attack the class notice approved by the District Court as insufficiently "dumbed down," Petition at 5, when he weighed in on the *other* side of the balance below.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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